Jurisdictional Statement

Office-Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

81-441

Case No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PAUL MARSA,

..... **Appellant**

vs.

DONALD J. WERNIK, individually and as the Mayor of the Borough of Metuchen, DONALD J. BARNICKEL, JOHN W. BERTRAND, PATRICIA LAGAY, DENNIS O'LEARY, THOMAS F. SHARP, and JOHN WILEY, JR., individually and as members of the Council of the Borough of Metuchen,

..... **Appellees**

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

Robert A. Vort
Attorney for Appellant
1180 Raymond Boulevard
Newark, New Jersey 07102
(201) 643-2022

Austin, TX • Gustav Broukal Press • (512) 458-1244

September 4th, 1981.

QUESTION PRESENTED

Whether the practice of a municipal council of commencing public meetings with prayer or silent meditation violates the Establishment Clause of the First Amendment to the United States Constitution.

INTERESTED PARTIES

The parties to this appeal are identified in the caption. Appellant, plaintiff below, is Paul Marsa, a resident of Metuchen, New Jersey. Appellees are the Mayor and Borough Council of Metuchen, sued in their individual and official capacities.

TABLE OF CONTENTS

Opinions Below 1

Jurisdictional Basis 3

Constitutional Provision Involved 3

Municipal Practice Involved 4

Statement of the Case 4

Reasons for Plenary Consideration 5

Conclusion 11

TABLE OF AUTHORITIES

Constitutional Provision Cited

U. S. Constitution, Amendment 1 .....4, 6, 7, 8, 11

Statutes Cited

28 U.S.C. §1257(2) 2, 6

28 U.S.C.§2103 3

N.J.S.A. 10: 4-6 2

N.J.S.A. 40:88-1 2

Cases Cited

Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979) 5, 7

Bogen v. Doty, 456 F.Supp. 983 (D.Minn. 1978) *affd.*,.... 9
598 F.2d 1110 (8th Cir. 1979)

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 2

Earley v. DiCenso, 403 U.S. 602 (1971) 10

Engel v. Vitale, 370 U.S. 421 (1962) 7, 10

Epperson v. Arkansas, 393 U.S. 97 (1968) 9

King Manufacturing Co. v. Augusta, ... 2
277 U.S. 297 (1928)

Kulko v. Superior Court, 436 U.S. 84 *rehg. den.*..... 2
438 U.S. 908 (1978)

Lincoln v. Page, 109 N.H. 30, ... 6, 9
241 A.2d 799 (1968)

Marsa v. Wernik, 86 N.J. 232,..... 3, 5, 6, 7, 8, 9
430 A.2d 888 (1981)

Marsa v. Wernik, 163 N.J.Super. 589, 395 A.2d 530 3
(Ch. Div. 1978) *affd o.b.* 171 N.J. Super. 587,
410 A.2d 282 (1980) *affd* 86 N.J. 232,
430 A.2d 888 (1981)

St. Martin Evangelical Lutheran Church
v. South Dakota, ... 2
101 S.Ct. 2142 (1981)

Stone v. Graham, 101 S.Ct. 192 (1980)..... 8

West Virginia State Board of Education v. Barnette,..... 10
319 U.S. 624 (1943)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. _____

PAUL MARSA,

..... **Appellant**

vs.

DONALD J. WERNIK, individually and as the Mayor of the Borough of Metuchen, DONALD J. BARNICKEL, JOHN W. BERTRAND, PATRICIA LAGAY, DENNIS O'LEARY, THOMAS E. SHARP, and JOHN WILEY, JR., individually and as members of the Council of the Borough of Metuchen,

..... **Appellees**

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL BASIS

This appeal seeks review of a judgment of the Supreme Court of New Jersey entered June 8, 1981. That judgment sustained the constitutionality of the practice of the Metuchen, New Jersey Town Council of commencing public

meetings either with a prayer delivered by a councilman or with silent meditation.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(2). See also *City of New Orleans v. Dukes,* 427 U.S. 297, 301 (1976), *King Manufacturing Co. v. Augusta,* 277 U.S. 100, 111 (1928). This appeal challenges the constitutionality of a municipality's rules governing the conduct of public meetings. Although those rules do not constitute a statute in the commonly used sense of the word, appellant submits that they do so within the meaning of 28 U.S.C. §1257(2) because those rules were passed by virtue of a state statute delegating to municipalities the duty to hold public meetings, N.J.S.A. 40: 88-1*, and in conformity to another statute governing the conduct of public meetings, N.J.S.A. 10:4-6 *et seq.*

Assuming *arguendo*, this Court holds that it lacks jurisdiction by appeal, this Court should treat the appeal as a petition for *certiorari.* 28 U.S.C §2103. *Cf., St. Martin Evangelical Lutheran Church v. South Dakota,* 101 S.Ct. 2142, 2147 n.9 (1981), *Kulko v. Superior Court,* 436 U.S. 84, *rehg.den.* 438 U.S. 908 (1978).

*N.J.S.A. 40:88-1 provides in relevant part: "The mayor and councilmen of every borough shall constitute the council thereof. They shall hold an annual meeting on January first at 12 o'clock noon, or during the first seven days of January in any year, and such other meetings, or adjourned meetings at such time and place as they may by resolution direct, but all regular meetings shall be held within the borough."

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 86 N.J. 232, 430 A.2d 888 (1981). It affirmed a judgment of the Superior Court of New Jersey, Chancery Division reported at 163 N.J.Super. 589, 395 A.2d 530 (1978). That judgment had been affirmed, substantially on the opinion of the trial court, by the Superior Court of New Jersey, Appellate Division at 171 N.J.Super. 587, 410 A.2d 282 (1980).

MUNICIPAL PRACTICE INVOLVED

The municipal practice was described by appellee Donald Wernik, Mayor of Metuchen, as follows: After the roll call of council members, there is an invocation or silent meditation. The mayor asks those who wish to rise for the invocation or meditation to do so. A council member, chosen on a rotating basis in alphabetical order, then delivers an invocation or announces a period of silent meditation. The council then salutes the flag and proceeds with its other business.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Appellant is an Atheist who has regularly attended meetings of the Metuchen Borough Council. The Council commences its public meetings with an invocation or with silent meditation. The invocation is delivered on a rotating basis by council members unless they choose to start with meditation. Many invocations have been addressed to a Heavenly Father.

Appellant objected to this practice, but appellees maintained it. Appellant sued to enjoin the practice in the Superior Court of New Jersey, Chancery Division, grounding his complaint upon a claim that the practice violated the

Establishment Clause of the First Amendment to the United States Constitution.

That Court sustained the practice, granting defendants' motion for summary judgment and denying plaintiff's motion for summary judgment. 163 N.J.Super. 589, 395 A.2d 530 (1978). The Superior Court, Appellate Division, affirmed on the opinion of the trial court. 171 N.J.Super. 587, 410 A.2d 282 (1980). The Supreme Court of New Jersey affirmed 86 N.J. 232, 430 A.2d 888 (1981).

In affirming, the Supreme Court of New Jersey noted that only the federal Constitution, not the New Jersey Constitution, was involved. 86 N.J. at 239 n.2, 430 A.2d at 892 n.2. The issue of Establishment Clause violation was raised in appellant's complaint, was the basis for the parties' motion and cross-motion for summary judgment, and was the focus of all judicial analyses of the action.

REASONS FOR PLENARY CONSIDERATION

Appellees' practice, subject to variations, is common to many public bodies. Lower courts have addressed the issue raised by this appeal with conflicting rationales. Compare *Marsa v. Wernik*, 86 N.J. 232, 430 A.2d 888 (1981) with *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979) *affg* 456

F.Supp. 983 (D.Minn. 1978) and with *Lincoln v. Page*, 109 N.H. 30, 241 A.2d 799 (1968), all of which set different standards by which to judge the constitutionality of invocations at public meetings of government bodies.

If the practice herein challenged is unconstitutional, this Court should reverse. If it is constitutional, this Court should nevertheless grant the appeal plenary consideration so that it can offer governmental officials guidance as to the standards by which they can properly include some plea for divine guidance within their public meetings. Should the Court hold that the municipal practice questioned herein not be a statute within 28 U.S.C. §1257(2) or that appeal is not an appropriate vehicle for review by this Court, the foregoing factors more than justify issuance of a writ of *certiorari*.

The Supreme Court of New Jersey held that the Metuchen practice did not violate the First Amendment because, *inter alia*, of the absence of clergy. 86 N.J. at 253-54, 430 A.2d at 899. The Eighth Circuit sustained the same practice because clergymen rather than lay people delivered the invocation. That Court held that a volunteer might be more zealous in the communication of sectarian prayer. 598 F.2d at 1113.

If municipal officials wish to adopt such a practice, they should be entitled to guidance as to how to implement it

—whether with clergymen as in the Eighth Circuit or without them as in New Jersey.

The Courts also differed on the legal significance of the absence of children from the public meetings. Appellees argued in the courts below that their practice should be sustained because the prayers were not directed at impressionable children. Appellant argued the contrary, that the First Amendment did not distinguish between adults and children.

The Supreme Court of New Jersey agreed with appellees that the absence of children supported the constitutionality of the practice. 86 N.J. at 252, 254, 430 A.2d at 899. The Eighth Circuit explicitly rejected this argument. In response to the public officials' argument that *Engel v. Vitale*, 370 U.S. 421 (1962) was premised upon the involvement of children, the Court of Appeals stated: "(A) close reading of the (Supreme) Court's opinion negates any such distinction." 598 F.2d at 1113.

For the foregoing reasons, no municipal attorney in this country can advise his client how to implement such a program. To decide whether to invite a clergyman, for example, counsel would be justified in flipping a coin than in weighing the analyses of the Eighth Circuit and of the Supreme Court of New Jersey.

There is a more fundamental reason why this Court should grant plenary consideration to this appeal. Both the Eighth Circuit and the Supreme Court of New Jersey were, respectfully, wrong. Both held that the challenged practice had a clearly secular purpose, but without independent analysis of the claimed secular purpose vis-a-vis the religious components inhering in the practice. Rather, each Court simply analyzed whether the proffered justification for the practice, on its face, had a clearly secular purpose. If it did, the practice satisfied the first prong of the three-pronged test without regard to whether the practice had religious components. In so doing, they erred for, as held in *Stone v. Graham*, 101 S.Ct. 192, 193-94 (1980), they were required to independently analyze the allegedly secular purpose.

Moreover, since prayer is inherently religious, it must have a religious purpose. The establishment of a solemn tone and serious purpose, the allegedly secular purpose in this action, could have been achieved through non-religious means ranging from singing a patriotic song to a stern banging of the gavel. The introduction of religion to accomplish a secular aim is an unnecessary and therefore excessive entanglement of church and state. The Supreme Court of New Jersey disregards this part of the three-pronged test. 86 N.J. at 242-43, 430 A.2d at 894.

The Supreme Court of New Jersey also held that delivery of prayer by public officials did not constitute an endorsement of prayer. It based this conclusion on the routine nature of the practice, the historical precedent for it and upon the non-denominational nature of the prayer. 86 N.J. at 252-53, 430 A.2d at 899. The District Court in *Bogen v. Doty*, 456 F. Supp. 983 (D. Minn. 1978) and the Supreme Court of New Hampshire, *Lincoln v. Page*, 109 N.H. 30, 241 A.2d 799 (1968) had also held that the historical precedent for the practice justified its constitutionality.

These holdings, however, were wrong. Historical precedent plays no part in application of the tripartite test. If a practice is unconstitutional, it is unconstitutional, and the longevity of the practice will not impart a clearly secular purpose, neutralize the effect of the prayer or mitigate the government entanglement.

The non-denominational nature of the prayer does not support the decision below. It also contravenes several holdings of this Court which mandate neutrality not only among religions but also between religion and non-religion. *E.g., Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). Were the nondenominational character of the invocation a basis for sustaining constitutionality, it would, however, only beg the question for then government officials would

have to review and edit the prayers to insure their non-denominational character and to insure that the prayers would be acceptable to the public. General acceptability of prayer, in turn, has no basis in First Amendment analysis. Majority rule does not apply to First Amendment rights. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

This sanction of non-denominational prayer because it was generally acceptable has been adopted implicitly and explicitly by all the Courts which have addressed the issue raised by this appeal. It means that a person who objects to prayer at public meetings, who is denied judicial relief, can have no recourse against the practice other than to campaign for and support at the next election other candidates whose First Amendment views coincide with his. This result throws religion into the public arena with citizens debating whether to permit prayer and, if so, what type of prayer to permit. The Establishment Clause was designed to prevent just such an event. *Earley v. DiCenso*, 403 U.S. 602, 622-24 (1971), *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962).

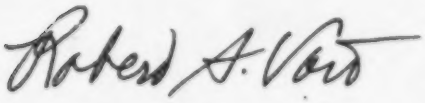
If the challenged practice is unconstitutional, its pervasive appearance in public meetings warrants plenary consideration and reversal. If, on the other hand, the practice can be constitutional, this Court should nevertheless grant plenary

consideration so that government attorneys throughout the nation can advise their clients as to the guidelines for implementing the practice.

These issues do not permit simplistic analysis. Each court which has published an opinion sustaining the challenged practice — the Supreme Courts of New Hampshire and of New Jersey, the Superior Court of New Jersey, the Courts of Appeals for the Eighth Circuit and the District Courts in Minnesota - has developed its own rationale. Briefs and oral argument which address the issues and subsidiary questions at length are necessary and desirable.

CONCLUSION

For the foregoing reasons, appellant requests that this Court note probable jurisdiction. Should the Court deem appeal improper, appellant petitions this Court to issue a writ of *certiorari*. Respectfully submitted,



/s/ Robert A. Vort

APPENDICES

APPENDIX A

SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION

November 6, 1978

PAUL MARSA, Plaintiff

v.

DONALD J. WERNIK, individually and as the Mayor of the Borough of Metuchen, DONALD J. BARNICKEL, JOHN W. BERTRAND, PATRICIA LAGAY, DENNIS O'LEARY, THOMAS E. SHARP, and JOHN WILEY, JR., individually and as members of the Council of the Borough of Metuchen, Defendants.

FURMAN, J. S. C.

[1] Plaintiff challenges the constitutionality of the practice of a nondenominational invocation or, alternatively, a silent meditation of about a minute at the start of regular meetings of the Metuchen Borough Council, immediately following the announcement of compliance with the Open Public Meetings Act (*N.J.S.A.* 10:4-6 *et seq.*) and the roll call. His challenge is brought solely under the establishment of religion clause of the First Amendment to the United States Constitution, which is applicable to the States under the Fourteenth Amendment. The Knights of Columbus have intervened.

On motion and cross-motion for summary judgment the facts are undisputed. The council practice, which is not formalized in any ordinance, resolution or rule of procedure, is as follows. The mayor asks those who wish on the council and in the audience to rise for an invocation or silent meditation. The individual council members, on a rotating basis, give a short invocation or ask for a brief silent meditation. The salute to the flag follows. Plaintiff is an

Atheist who has objected to the practice and remained seated during the invocation or silent meditation and the salute to the flag.

Three recent invocations by as many council members are before the court. Two are addressed to "Heavenly Father." Another is a prayer for protection and nourishment without addressing by name god or divine providence. A fourth council member asked for silent meditation: "Let us take the next few moments of silence to each seek in our own way whatever sources of inspiration will help us make those decisions which will be in the best interests of all the citizens of the Borough of Metuchen."

Nothing in the record suggests that, except as a prelude to silent meditation, any council members have offered a nonreligious call to conscience or other moral declaration, rather than an invocation to divinity.

Lincoln v. Page, 109 *N.H.* 30, 241 *A.*2d 799 (Sup.Ct. 1968), upheld the constitutionality of a practice of opening town meetings with a prayer by a local clergyman. The practice was viewed as not an establishment of religion proscribed by the establishment clause of the First Amendment in "any pragmatic, meaningful and realistic sense."

No other direct authority is cited. In United States and New Jersey Supreme Court opinions invalidating prayers in public schools (*Murray v. Curlett*, 374 *U.S.* 203, 83 *S.Ct.* 1560, 10 *L.Ed.*2d 844 (1963); *Engel v. Vitale*, 370 *U.S.* 421, 82 *S.Ct.* 1261, 8 *L.Ed.*2d 601 (1962); *State Bd. of Ed. v. Netcong Bd. of Ed.*, 108 *N.J.Super.* 564, 262 *A.*2d 21 (Ch. Div. 1970), aff'd 57 *N.J.* 172, 270 *A.*2d 412 (1970), *cert.* den. 401 *U.S.* 1013, 91 *S.Ct.* 1253, 28 *L.Ed.*2d 550 (1971)) the immpressionability of children and their compulsory school attendance are factors considered. *Murray* is also distinguishable because the laws struck down required the reading of verses from the bible.

Justice Brennan, concurring in *Murray*, drew a distinction between school prayers and prayers before legislative bodies, as follows:

> The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of

any nonreligious purpose. We decline to do so, however, because it has not been contended or established by the record in this case that this particular invocation or prayer is used with any great frequency or enjoys any special official identity or endorsement. Although, standing alone, it is of questionable validity, this invocation is only one of several communications used, and most of the others are not clearly or plainly religious in content or character, even if some have a religious shade in their meaning and tone.

In sum, even though some of the invocations may, when used in a public meeting, inject a religious motif that would otherwise be absent, that religious dimension is not predominant and does not in our view denigrate or dispel the presence of a secular goal. The first part of the tripartite standard tolerates some religious purpose, as long as there is also a *bona fide* and demonstrable secular purpose. That is present in this case. An objective of the opening exercises is to create at municipal council meetings an atmosphere conducive to the open exchanges, cooperative participation, and tolerant and conscientious deliberations of all those present — citizens and officials alike — who are mutually engaged in the discharge of the public's business.

III

The standard causing greater conceptual and empirical difficulties is that involving the second element of the three-prong test — the "effect" test. It is related to the first — the "purpose" test — but it is not subsumed by it. It recognizes that even though activity has a legitimate secular purpose it may, nevertheless, under the second element of the tripartite standard, have a primary or principal effect that either encourges or discourages religion. See *Committee for Public Education and Religious Liberty v. Nyquist, supra*, 413 *U.S.* at 773, 93 *S.Ct.* at 2965, 37 *L.Ed.*2d at 963. This test is not an easy one to pass. "Many statutory schemes found to be permissible under [the] secular purpose test," we observed in *Resnick v. E. Brunswick Tp. Bd. of Ed., supra*, 77 *N.J.* at 110, "have foundered [because] their primary effect was to advance religion."

or opening exercises generally. This entails the constitutional assessment of a range of so-called invocations as well as an appreciation of the purpose, setting, history and circumstances surrounding these municipal exercises.

In this vein, we find it significant that there has been no express avowal that the purpose of the opening exercise is religious in whole or in part. The opening exercises do not purport to be part of a religious program. They are part of a municipal legislative session. The assertion by defendants that the invocations have a secular purpose of calling on the consciences of those in attendance is not frivolous and is supported by the finding of the trial court. 163 *N.J. Super.* at 593. A purpose to establish a solemn atmosphere and serious tone for the public meetings can be considered a legitimate and *bona fide* secular purpose. See *Murray v. Curlett, supra*, 374 *U.S.* at 212-214, 10 *L.Ed.*2d at 852-854; *Zorach v. Clauson, supra*, 343 *U.S.* at 312-313, 72 *S.Ct.* at 683, 96 *L.Ed.* at 961. See also *Bogen v. Doty*, 598 *F.*2d 1110, 1113 (8 Cir. 1979); *Lincoln v. Page*, 109 *N.H.* 30, 241 *A.*2d 799 (1968). Accord *Grossberg v. Deusebio*, 380 *F. Supp.* 285 (E.D. Va. 1974); *Wood v. Mt. Lebanon Tp. School Dist.*, 342 *F. Supp.* 1293 (W.D. Pa 1972); *Wiest v. Mt. Lebanon School Dist*, 457 *Pa.* 166, 320 *A.*2d 362 (1974), cert. den. 419 *U.S.* 967, 95 *S.Ct.* 231, 42 *L.Ed.*2d 183 (1974) (invocations at high school graduation ceremonies have secular purpose on the basis of history and tradition). *Cf. Colo v. Treasurer & Receiver Gen.*, 392 *N.E.*2d 1195 Mass. Sup. Jud. Ct. 1979) (upheld a law authorizing payment of salaries of the chaplains of the state legislature whose function was to give opening prayers; the secular purpose was to maintain tradition and to achieve solemnity).

A legitimate secular purpose also is evident from the content of the sample exercises in this case. However, two of the four do give thanks to, or seek guidance from a deity or divine being, as expressed by their references to "Heavenly Father." One in particular, footnote [1] (#4), is especially laden with such expressions. One might be tempted to conclude, at least with respect to that communication, that its religious character is "clear" or "plain" and the religious purpose in using that prayer is "preeminent" and "inconsistent" with

the kind prohibited by the Establishment Clause. Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect. [374 *U.S.* at 299, 300, 83 *S.Ct.* at 1612]

In *Zorach v. Clausen*, 343 *U.S.* 306, 72 *S.Ct.* 679, 96 *L.Ed.* 954 (1951), which ruled constitutional a program of released time on a voluntary basis for religion education classes during school hours outside school, Justice Douglas commented broadly in dictum:

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me god" in our courtroom oaths — these and all other references to the almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious Atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court." [343 *U.S.* at 312, 313, 72 *S.Ct.* at 683]

In New Jersey the rules of procedure of both the Senate and General Assembly provide for a prayer as the first order of business after the presiding officer has taken the chair.

[2] In constitutional challenges under the establishment of religion clause the United States Supreme Court has evolved a three-pronged test. *Meek v. Pittenger*, 421 *U.S.* 349, 95 *S.Ct.* 1753, 44 *L.Ed.*2d 217 (1975), reh. den. 422 *U.S.* 1049, 95 *S.Ct.* 2668, 45 *L.Ed.*2d 702 (1975); *Committee for Public Education v. Nyquist*, 413 *U.S.* 756, 93 *S.Ct.* 2955, 37 *L.Ed.*2d 948 (1973); *Lemon v. Kurtzman*, 403 *U.S.* 602, 91 *S.Ct.* 2105, 29 *L.Ed.*2d 745 (1971), reh. den. 404 *U.S.* 876, 92 *S.Ct.* 24, 30 *L.Ed.* 123 (1971); *Walz v. Tax Comm'n*, 397 *U.S.* 664, 90 *S.Ct.* 1409, 25 *L.Ed.*2d 697 (1970); *Resnick v. E. Brunswick Tp. Bd. of Ed.*, 77 *N.J.* 88, 389 *A.*2d 944 (1978). Legislation violates this clause if it is without a secular purpose, if it is without a primary effect that neither advances nor inhibits religion or if it fosters excessive governmental entanglement with religion. Unless meeting all three of the foregoing tests legislation or governmental action of a legislative nature is constitutionally invalid.

Assuming that a practice of a municipal governing body is legislative action which may be proscribed under the establishment of religion clause (*Lincoln v. Page, supra*), the practice of the Metuchen Borough Council must be measured under the three-pronged test.

The practice under challenge does sanction a religious exercise at a governmental meeting, an invocation as a prayer for divine blessing and guidance. But the religious exercise is nondenominational and may or may be called for at the option of the council member whose turn it is to give an invocation or to ask for silent meditation. There is no compulsion on any council member or member of the audience to participate or to stand during the invocation or silent meditation.

A secular purpose and a secular primary effect are evident, that is, to call on the consciences and moral resolves of those in attendance at the council meeting and to inspire their wisest and fairest participation through a few opening moments of prayer or reflection. That one alternative is a religious invocation is a recognition that a majority of

Americans are affiliated with some organized religion and may gain moral encouragement through prayer.

It is significant that prayer at legislative as well as other public meetings is so interwoven into the fabric of American life. Unlike the school prayer cases, the Metuchen Borough Council practice does not advance religion with impressionable youth. There is no evidence in the record of any political reprisal against a council member who elected silent meditation rather than an invocation or of any denial of an opportunity to present his views because plaintiff or any other member of the public present chose to sit during an invocation.

Plaintiff's challenge rests solely on the sanction of prayer at a governmental meeting, in some sense a governmental recognition and fostering of religion and, through tax monies which finance the meeting, a governmental contribution to religion.

A rationale striking down the practice under challenge as an excessive governmental entanglement with religion would extend to interdict prayers before federal and state legislative bodies.

In the absence of higher judicial authority this court concludes that any Metuchen Borough Council entanglement with religion is minimal, not excessive. The practice under challenge is sustained because of its secular purpoe and primary effect and because it does not foster excessive governmental entanglement with religion.

Judgment is rendered for defendants.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY: CHANCERY DIVISION MIDDLESEX COUNTY DOCKET NO. C-1311-77

This matter being presented to the Court on motion and cross motion for summary judgment in the presence of Robert A. Vort, Attorney for Plaintiff, Martin A. Spritzer, Attorney for Defendants, Donald Joworisak appearing for Thomas W. Sharlow, Attorney for the intervener, Knights of Columbus, St. Francis Council 3272, and the Court having heard oral argument and considered the briefs, affidavits, and exhibits presented by the parties, and for good cause shown, it is on this 5th day of December, 1978, ORDERED that Plaintiff's motion for summary judgment is hereby denied; that Defendants' motion for summary judgment is hereby granted; and judgment is hereby rendered for the Defendants in accordance with the opinion of the Court decided November 6, 1978 and filed November 9, 1978.

Honorable David D. Furman, J.S.C.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A—1575-78

PAUL MARSA

Plaintiff-Appellant

v.

DONALD J. WERNIK, individually

and as the Mayor of the Borough of Metuchen, DONALD J. BARNICKEL, JOHN W. BERTRAND, PATRICIA LAGAY, DENNIS O'LEARY, THOMAS E. SHARP, and JOHN WILEY, JR., individually and as members of the Council of the Borough of Metuchen,

Defendants-Respondents.

Argued December 11, 1979 — Decided Jan. 11, 1980.

Before Judges Fritz, Kole and Lane.

On appeal from Superior Court of New Jersey, Chancery Division, Middlesex County.

Reported at 163 N.J. Super. 589 (Ch.Div. 1978).

Robert A. Vort argued the cause for appellant.

Martin A. Spritzer argued the cause for respon-

dents (Martin A. Spritzer, attorney; Dennis J. Conklin, on the brief).

PER CURIAM

We affirm substantially for the reasons set forth by Judge Furman in his opinion at 163 N.J.Super. 589 (Ch.Div. 1978). See also *Bogen v. Doty*, 598 F.2d 1110 (8 Cir. 1979).

APPENDIX D

SUPREME COURT OF NEW JERSEY
A-38 September Term 1980

PAUL MARSA,
Plaintiff-Appellant,

v.

DONALD J. WERNIK, individually
and as the Mayor of the Borough
of Metuchen, DONALD J. BARNICKEL,
JOHN W. BERTRAND, PATRICIA LAGAY,
DENNIS C'LEARY, THOMAS E. SHARP,
and JOHN WILEY, JR., individually
and as members of the Council of
the Borough of Metuchen,
Defendants-Respondents.

Argued November 5, 1980 — Decided June 8, 1981

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 171 *N.J. Super.* 587 (1980).

Robert A. Vort argued the cause for appellant.

Martin A. Spritzer argued the cause for respondents (*Martin A. Spritzer*, attorney; *Dennis J. Conklin*, on the brief).

The opinion of the Court was delivered by HANDLER, J.

The issue presented in this case is whether the commencement of public meetings of a municipal governing body with a brief exercise, variously referred to as an invocation, prayer or silent meditation, violates the Establishment of Religion Clause of the First Amendment to the United States Constitution. Challenging this practice is a resident and taxpayer of the municipality, an atheist. Defendants are the mayor and members of the municipal governing body.

The facts as they appear from the pleadings and affidavits in conjunction with motions for summary judgment are not complicated and, although controversial, are not controverted. Plaintiff regularly attends meetings of the town council of the Borough of Metuchen. At each meeting there is first a formal announcement to the effect that in calling the meeting there has been compliance with requirements of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq*. This is followed by the taking of a roll call. The mayor then asks those who so wish, to rise for an invocation or silent meditation which is delivered by a particular member of the municipal council. It appears that the member who gives the invocation has himself determined or selected its contents. There is nothing to suggest that it is in any way subject to the approval of any other official or person. Four sample messages or invocations are before the Court.[1] It is not clear, however, to what extent these are typical or representative of all such invocations or with what degree of regularity or frequency any of these is actually used.

Plaintiff claims that the practice of opening council meetings with what he calls an invocation, prayer or silent meditation causes him great discomfort and may have the effect of dissuading plaintiff and others from attending these meetings. He has objected to the "invocation" by remaining seated when the mayor asks all present to stand. Defendants admit that meetings are commenced with such an exercise but deny that there is anything legally wrong with the practice. They point out that in the past meetings were customarily opened with an invocation by local clergy until June 1976, when council members individually began giving the invocations.

The trial judge entered summary judgment for defendants, 163 *N.J. Super*. 589 (Ch. Div. 1978), applying a three-pronged test set forth by the United States Supreme Court for Establishment Clause cases. The judge concluded that the practice of opening a public meeting with an invocation has a secular purpose, has a primary effect that neither advances nor inhibits religion, and does not foster excessive governmental entanglement with religion. *Id*. at 592-593. He found that the invocations are nondenominational and

that participation is noncompulsory. *Id.* at 593. The secular purpose and primary effect of the invocation, he concluded, are to "call on the consciences and moral resolves of those in attendance at the council meeting and to inspire their wisest and fairest participation through a few opening moments of prayer or reflection." *Id.* The judge found minimal entanglement, analogizing to the practice of opening state and federal legislative sessions with prayer. *Id.* at 594. He distinguished cases prohibiting prayer in public schools on the basis of the "impressionability of children and their compulsory school attendance." *Id.* at 591.The Appellate Division affirmed on the opinion below. 171 *N.J. Super.* 587 (1980). Plaintiff appealed to this Court as of right.See *R.* 2:2-1(a)(1).

I

The principles underlying the Establishment Clause of the First Amendment are clear.[2] As stated by Justice Black in *Everson v. Board of Education*, 330 *U.S.* 1, 15-16, 67 *S.Ct.* 504, 91 *L.Ed.* 711, 723 (1947):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against estab-

lishment of religion by law was intended to erect "a wall of separation between Church and State."

Over the years governmental action touching upon religious practices, beliefs and attitudes has served to probe the limits of the Establishment Clause. The Supreme Court has defined these limits under a three-element test in order to identify the demarcation between church and state which is at the heart of the Establishment Clause. This standard was succinctly described in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 *U.S.* 756, 772-773, 93 *S.Ct.* 2955, 37 *L.Ed.*2d 948, 962-963 (1973), *viz.*:

> [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive entanglement with religion.

The Supreme Court recently reaffirmed the three-part test applied in Establishment Clause cases in *Stone v. Graham, 66 L.Ed.*2d 199 (1980).

This tripartite test has most often been applied in the area of state aid to nonpublic schools. See, *e.g., Committee for Public Education and Religious Liberty v. Regan,* 100 *S.Ct.* 840, 63 *L.Ed.*2d 94 (1980); *New York v. Cathedral Academy,* 434 *U.S.* 125, 98 *S.Ct.* 340, 54 *L.Ed.*2d 346 (1977); *Wolman v. Walter,* 433 *U.S.* 229, 97 *S.Ct.* 2593, 53 *L.Ed.*2d 714 (1977); *Roemer v. Board of Public Works of Maryland,* 426 *U.S.* 736, 96 *S.Ct.* 2337, 49 *L.Ed.*2d 179 (1976); *Meek v. Pittinger,* 421 *U.S.* 349, 95 *S.Ct.* 1753, 44 *L.Ed.*2d 217 (1975), reh. den. 422 *U.S.* 1049, 95 *S.Ct.* 2688, 45 *L.Ed.*2d 702 (1975); *Committee of Public Education and Religious Liberty v. Nyquist, supra; Tilton v. Richardson,* 403 *U.S.* 672, 91 *S.Ct.* 2091, 29 *L.Ed.*2d 790 (1971), reh. den. 404 *U.S.* 874, 92 *S.Ct.* 25, 30 *L.Ed.*2d 120 (1971); *Lemon v. Kurtzman,* 403 *U.S.* 602, 91 *S.Ct.* 2105, 29 *L.Ed.*2d 745 (1971), reh. den. 404 *U.S.* 876, 92 *S.Ct.* 24, 30 *L.Ed.*2d 123 (1971).These cases often turn upon the third element of the test, namely, the degree of governmental entanglement with religion. See *Resnick v. East Brunswick Tp. Bd. of Education,* 77 *N.J.* 88, 115 (1978). That element, first proffered in *Walz v. Tax*

Commission of City of New York, 397 *U.S.* 664, 675, 90 *S.Ct.* 1409, 1414, 25 *L.Ed.*2d 697, 705 (1970) (upholding a state property tax exemption for religious organizations), proscribes "excessive" government involvement in religion, an involvement that entails continuing official surveillance "leading to an impermissible degree of entanglement" in religious activities.

The present case may be contrasted with the school aid cases in that it is one in which government is engaged directly in an activity claimed to be religious in purpose and effect. This situation can be analogized to the Supreme Court cases involving officially sponsored prayers or other religious exercises in public schools. *E.g., Stone v. Graham, supra* (statute required posting of the Ten Commandments on walls of public classrooms); *Murray v. Curlett*, 374 *U.S.* 203, 83 *S.Ct.* 1560, 10 *L.Ed.*2d 844 (1963) (students required to read from the Bible and recite the Lord's Prayer in school); *Engel v. Vitale*, 370 *U.S.* 421, 82 *S.Ct.* 1261, 8 *L.Ed.*2d 601 (1962) (teacher recited brief, denominationally neutral prayer, with voluntary participation by students); *West Virginia State Bd. of Ed. v. Barnette*, 319 *U.S.* 624, 63 *S.Ct.* 1178, 87 *L.Ed.* 1628 (1943) (students required to salute flag and recite pledge of allegiance); *cf. Zorach v. Clauson*, 343 *U.S.* 306, 72 *S.Ct.* 679, 96 *L.Ed.* 954 (1952) (students "released" during school day to attend religious schools). Only *Stone v. Graham* explicitly mentioned the "entanglement" element of the three-part test, but all of the cases recognized that, if under either of the initial standards of the three-prong test —those relating to purpose and effect — the challenged government conduct crosses the pale from the secular to the religious, it would offend the Establishment Clause of the First Amendment.

In this context, where the conduct itself is undertaken directly by governmental officials or personnel, the third element of the tripartite test — excessive government entanglement — is effectively embraced by the other standards of the test. In such a situation, if direct governmental action constitutes a "religious" practice under the initial components of the three-prong test, namely, the absence of a secular purpose or a primary or principal effect

inhibiting or advancing religion, then, by definition, government itself can be said to be actually and directly engaged and, obviously, inextricably "entangled" in religion. In contrast, if the activity offends neither of these standards, then in a constitutional sense religion would not be at all involved. In that converse posture, where government itself is not directly engaged in a religious activity or function, and is not otherwise supervising, working through or dealing with religious entities, there would be no entanglement by government in the religious domain.[3]

Since we are here confronted not with indirect action in the form of "continuing official surveillance" of religious persons or entities but with conduct undertaken directly by government, namely, the opening exercises of public municipal meetings by municipal officials, it will suffice for analytic purposes to concentrate upon the elements of the tripartite test relating to whether the controverted conduct or activity has a secular purpose and whether its primary or principal impact either advances or discourages religion.

II

We turn first to the element of the tripartite test which deals with the presence of a secular purpose. The enunciation of this test has been fairly consistent throughout the cases. The test has been said to call for a showing that there be "a secular purpose," *Lemon v. Kurtzman, supra*, 403 *U.S.* at 612, 29 *L.Ed.*2d at 755, *Wolman v. Walter, supra*, 433 *U.S.* at 236, 53 *L.Ed.*2d at 725 (1977), "a clearly secular legislative purpose," *Committee for Public Education and Religious Liberty v. Nyquist, supra* 413 *U.S.* at 772-773, 37 *L.Ed.*2d at 962-963. The secular purpose must be legitimate and *bona fide*. See, *e.g., Sloan v. Lemon*, 413 *U.S.* 875, 93 *S.Ct.* 2982, 37 *L.Ed.*2d 939 (1973), reh. den. 414 *U.S.* 881, 94 *S.Ct.* 30, 38 *L.Ed.*2d 128 (1973); *Meek v. Pittinger, supra*; *Walz v. Tax Commission of New York, supra*, 397 *U.S.* at 689, 90 *S.Ct.* at 1422, 25 *L.Ed.*2d at 712 (Brennan J. concurring.) We stated in *Resnick v. E. Brunswick Tp. Bd. of Ed., supra*, 77 *N.J.* at 108, that a legitimate and *bona fide* nonsectarian purpose can be evidenced "a reasonable legislative state-

ment announcing a colorable secular design." Moreover, the secular purpose need not be exclusive; there can be a duality of purpose. *Murray v. Curlett, supra.* A secular purpose may coexist with a nonsecular purpose, so long as the latter does not dominate and is not the predominant or major purpose. *E.g., Lemon v. Kurtzman, supra.*

The proper scope and application of the "secular purpose" standard in terms of this case is best derived from the decisions dealing with prayers or religious exercises in the public schools, which provide the most authoritative proximate analogy to the municipal practice challenged here. In *Murray v. Curlett*, a particular state statute required that schools begin each day with readings from the Bible and recitation of the Lord's Prayer. The Court recognized that a law could partake of more than one objective and acknowledged that permissible secular purposes could have, in part, a religious nature. Of relevance, in terms of the present case, the Court pointed out as examples of such secular purposes that courts and legislatures open official sessions with prayer or the mention of God and that oaths of office call for the help of God. 374 *U.S.* at 212-213, 83 *S.Ct.* at 1566, 10 *L.Ed.*2d at 852-853. The Court, however, rejected the idea that merely alleging a possible secular purpose would satisfy the first part of the test. In testing the strength of such allegations, the Court scrutinized the particular practice in terms of its essential content and found that the true meaning and plain understanding of the conduct — that which was clearly and unmistakably intended to be communicated — was religious. Further, the Court ruled that government may not, under the First Amendment, prefer one religion over another or religion over nonreligion but must remain neutral on both scores. *Id.* at 216, 83 *S.Ct.* at 1568, 10 *L.Ed.*2d at 855. It found that neutrality was breached because the readings were obviously of a religious nature, and that even if the purpose was not strictly or exclusively religious, reading from the Bible clearly and undisputably had a religious character inconsistent with use merely for nonreligious moral inspiration. *Id.* at 224, 83 *S.Ct.* at 1572, 10 *L.Ed.*2d at 859.

In *Engel v. Vitale*, the Court held that a school district's

requirement that an "official" prayer be read before class each day violated the First Amendment. Finding the readings clearly a religious activity, the Court said "the constitutional prohibition against law respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose *official* prayers for any group of the American people to recite *as a part of a religious program carried on by a government." 370 U.S.* at 425, 82 *S.Ct.* at 1264, 8 *L.Ed.*2d at 605 (emphasis added). Similarly, in *Stone v. Graham*, the Court held the "pre-eminent purpose" of posting the Ten Commandments on a school room wall to be "plainly religious." See also *Epperson v. Arkansas* 393 *U.S.* 97, 89 *S.Ct.* 266, 21 *L.Ed.*2d 228 (1968) (striking down law prohibiting teaching of evolution in classroom as violative of Establishment Clause).

Thus, the inquiry in terms of the "purpose" test is not whether the invocation or message constitutes or includes a religious communication or a prayer as such but whether its purpose, with or without such a religious message, meaning or connotation, is exclusively, strictly or essentially religious — whether it is religious to a degree sufficient to supplant or displace any secular objective. If the practice is enveloped in an indelible religious hue — if it is "clear[ly] of a religious character [that is] inconsistent with its use for nonreligious" purposes (*Murray v. Curlett*), or if its "preeminent purpose" is "plainly religious" (*Stone v. Graham*), or if it can be said to be a "prayer" or similar religious communication used "as part of a religious program" (*Engel v. Vitale*), then it will have failed the "purpose" test.

Plaintiff contends in this case that the exercise used for opening municipal council meetings constitutes prayer or invocations or meditation which is inherently religious and cannot have a legitimate secular purpose. Defendants rely, as did the trial judge, on the argument that the so-called invocation serves only as a call to conscience and fulfills a proper secular aim. The constitutional truth lies somewhere in between.

In addressing this contention, we have not been called upon to ascertain the constitutional validity of any particular invocation or prayer, but to consider the municipal practice

Governmental conduct may offend the Establishment Clause under the "primary effect" test if it has a substantial impact upon religion or has "the direct and immediate effect of advancing religion." *Committee for Public Education and Religious Liberty v. Nyquist, supra*, 413 *U.S.* at 785, n.39, 93 *S.Ct.* at 2971, n.39, 37 *L.Ed.*2d at 969, n.39; see L. Tribe, *American Constitutional Law* § 14-9 at 840 (1978). Additionally, the primary effect of a questioned practice must not only avoid religion in general, it must be totally nonsectarian. "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion," *Epperson v. Arkansas, supra*, 393 *U.S.* at 103-104, 89 *S.Ct.* at 270, 21 *L.Ed.*2d at 234; *Murray v. Curlett, supra*, 374 *U.S.* at 216, 83 *S.Ct.* at 1568, 10 *L.Ed.*2d at 855; see *Engel v. Vitale, supra*, 370 *U.S.* at 430, 82 *S.Ct.* at 1266-1267, 8 *L.Ed.*2d at 607. The government posture towards religion should be "a benevolent neutrality," *Walz v. Tax Commission of City of New York, supra*, 397 *U.S.* at 669, 90 *S.Ct.* at 1411, 25 *L.Ed.*2d at 701-702. See also, Note, 74 *Colum. L. Rev.* 1175, 1176 n.7 (1974). Thus, the essential question in terms of whether the religious or secular effect is primary would appear to be whether, in relation to any other impact or effect of the governmental conduct, the *religious* effect is primary rather than secondary, dominant instead of subordinate, substantial as opposed to insubstantial, or direct as contrasted with indirect and remote. In addition, the conduct must not favor in the slightest religion over nonreligion or one sect over another. This inevitably sensitive and complex question is obviously one of comparison and degree.

Though necessarily inviting an assessment of all relevant factors, the application of the "effect" test does not involve simply a mechanical weighing of the relative secular impacts against those which are nonsecular to see which tilt the scales. *Cf. Lemon v. Kurtzman, supra*, 403 *U.S.* at 614, 91 *S.Ct.* at 2112, 29 *L.Ed.*2d at 757 (application of the three-part test is not "a legalistic minuet"). The components of what constitutes a "primary effect" can be gleaned or extrapolated from the Supreme Court cases that have dealt with the analogous situation of prayer or sectarian activities in public

schools. The recurrent factors suggesting the presence or absence of a primary effect upon religion seem to involve (1) the content or meaning of the expression or practice itself; (2) an express avowal or explicit announcement of the purpose of the conduct; (3) the context or surroundings in which the particular conduct is undertaken; (4) the degree of official or governmental participation in or sponsorship of the activity; (5) the class of persons intended to be affected or influenced by the practice; (6) the presence or absence of compulsion upon those participating in the activity, and (7) the extent to which such conduct reflects traditional and long-standing conventions which have a secular character.

The interaction of these factors in the judicial application of the effect test is exemplified in the leading decisions in this area. Thus, in *Engel v. Vitale, supra*, the challenged practice, a school prayer, was one which was (1) religious in content, (2) undertaken in the setting of a public school program, (3) officially sponsored, (4) directed to children, and (5) compulsory. Further, with respect to the practice there was no (1) explicit avowal of any nonreligious purpose or (2) tradition of secularism. The Court also pointed out that in a public school setting, wherein children are taught generally in areas involving moral values and social norms, the school prayer could easily have been perceived as religious instruction. Accordingly, the Court found that the state's program was tantamount to the official establishment of the religious beliefs embodied in the prayer. 370 *U.S.* at 430, 82 *S.Ct.* at 1266, 8 *L.Ed.*2d at 607. To the same effect are *Stone v. Graham, Abington* and *Epperson*. See also *DeSpain v. DeKalb Cty. Community School Dist.*, 384 *F.*2d 836 (7 Cir. 1967), cert. den. 390 *U.S.* 906, 88 *S.Ct.* 815, 20 *L.Ed.*2d 873 (1968) (teaching a prayer of thanks to schoolchildren that did not even mention God violated the First Amendment).

By way of contrast, many cases have countenanced governmental practices as not violative of the Establishment Clause of the First Amendment, notwithstanding the presence of some of the factors suggestive of religious encouragement. See, *e.g.*, *Bogen v. Doty, supra*; *Lincoln v. Page, supra* (opening town meetings with an invocation by local clergy); *Colo. v. Treasurer & Receiver Gen., supra*

(payment of salaries for chaplains of state legislature to give opening prayers); *Wiest v. Mt. Lebanon School Dist., supra; Grossberg v. Deusebio, supra; Wood v. Mt. Lebanon School Dist., supra* (invocation at high school graduation ceremonies); see also *O'Hair v. Andrus*, 613 *F.*2d 931 (D.C. Cir. 1979) (celebration of Mass by the Pope on the National Mall of Capital); *O'Hair v. Paine*, 312 *F. Supp.* 434 (W.D. Tex. 1969), app. dism. 397 *U.S.* 531, 90 *S.Ct.* 1259, 25 *L.Ed.*2d 528 (1970), aff'd 432 *F.*2d 66 (5 Cir. 1970), cert. den. 401 *U.S.* 955, 91 *S.Ct.* 974, 28 *L.Ed.*2d 238 (1971) (recitation from Bible aboard Apollo flights). We do not necessarily endorse these decisions. Their results may be understood, however, as reflecting the notion that where all of the relevant factors collectively fail to imprint the effect of a governmental practice with a primarily religious character, the Establishment Clause will not have been violated. Thus, in these somewhat variant cases, the absence, in differing degrees and relationships, of (1) an avowed or express religious purpose, or (2) a religious or near-religious context, or a public school setting, or (3) an audience vulnerable to religious influences, such as school children, or (4) compulsory participation, as well as (5) the presence of an arguably secular tradition may have served to enable the questioned practices to surmount First Amendment compunctions. *Cf. Zorach v. Clauson, supra*, 343 *U.S.* at 312-313, 96 *L.Ed.* at 961; *Murray v. Curlett, supra*, 374 *U.S.* at 212-213, 83 *S.Ct.* at 1566, 10 *L.Ed.*2d at 852-853.

Turning to the official conduct at issue here, plaintiff argues that the practice of commencing public meetings with what he asserts is a prayer, invocation or meditation has a principal or primary effect of advancing religion because it "places a governmental seal of approval on religion." For this reason, he asserts a violation of the Establishment Clause under the "effect" test. The trial judge disagreed, noting that the primary effect as well as the secular purpose of the invocations was "to call on the moral consciences and moral resolves" and "to inspire [the] wisest and fairest participation" of those attending the municipal council meeting. 163 *N.J. Super.* at 593. The trial court also believed that it was important that the invocations were

nondenominational and noncompulsory which served to dissipate such an effect to further religion. *Id.* at 593-594.

In applying the constitutional analysis to the present case, we conclude that the primary effect of the opening exercises of the council meetings of the Borough of Metuchen is not to promote or inhibit religion. The content of the invocations is not in the main distinctively or plainly religious. The purpose of the exercise is not expressly religious; it is rather to solemnify governmental proceedings. The exercise in its contextual setting is not suggestive of religion or religious ritual; it is conducted as part of a legislative session before a local legislative body. While the opening exercise is conducted by individual council members, and to that extent is under an official aegis, it does not purport to be otherwise officially sponsored or authorized; rather each opening exercise can be viewed as the beliefs or sentiments of the individual in his private capacity. Furthermore, these exercises are not directed to young, impressionable school children. While there exists an element of compulsion in the sense that persons attending these meetings may understandably be under some social pressure to conform their behavior to the norm, there nevertheless is freedom of individual choice.[4] Finally, although longevity itself does not immunize conduct from constitutional invalidity, nor necessarily empty it of plainly religious content, past practices that have become traditional can acquire a predominantly nonsectarian flavor. Here, the exercises reflect an established practice that has become a governmental convention, not unlike many long-standing traditions involving nondenominational references to deities, including legislative invocations in the federal Congress and in legislatures, oaths of office, the "In God we Trust" inscription on coins (*Arrow v. United States*, 432 *F.*2d 242 (9 Cir. 1970)), or the pledge of allegiance. See, *e.g.*, *Zorach v. Clauson*, *supra*, 343 *U.S.* at 312-313, 72 *S.Ct.* at 683, 91 *L.Ed.* at 961; *Engel v. Vitale*, *supra*, 370 *U.S.* at 439-440, 446-450, 8 *L.Ed.*2d at 613-614, 616-619. *Murray v. Curlett*, *supra*, 374 *U.S.* at 212-213, 10 *L.Ed.*2d at 852-853.

In sum, most of the considerations relevant in ascertaining the primary effect of a particular governmental

practice under the Establishment Clause collectively suggest in this case that the effect of the opening exercise or procedure followed in the Borough of Metuchen is not predominantly or primarily one that serves to encourage or inhibit religion. In a constitutional sense, its impact upon religion as such may even be regarded as *de minimis* and thus, in terms of First Amendment strictures, unobjectable. See A. Sutherland, Jr., "Establishment According to *Engel*," 76 *Harv. L. Rev.* 25 (1962).

IV

Several factors, to summarize, merge and coalesce in this case to permit the challenged practice to survive the First Amendment attack made upon it. These involve the secular purpose of the practice, the neutral content of most of the invocations, the lack of a denominational tone or sectarian emphasis, and the absence of a religious or quasi-religious setting or the involvement of clergy. Additionally, the lack of a formal official authorization of the contents of the practice, the nonreligious context of its use as part of a legislative meeting and its relatively incidental role in the public meeting, as well as the non-mandatory participation of adults, as opposed to children, and its grounding in a long-standing tradition, all contribute to the conclusion that the First Amendment has not been offended.

It cannot be overemphasized, however, that we have been confronted in this particular case with a host of variables that have been frozen in the framework fixed by the record on appeal. The number and interrelation of such fluid factors can vary. A change in some — such as more distinctively religious exhortations or the more frequent and recurrent use of those that contain a religious meaning or a more pronounced official endorsement or governmental backing of any particular invocation or a greater degree of compulsion or even public or social suasion to join in the governmental exercise — can easily tip the scales the other way. *Cf. DeSpain v. DeKalb Cty. Community School Dist., supra* (kindergarten recitation of prayer); *Hall v. Bradshaw*, 630 *F.*2d 1018 (4 Cir. 1980), cert. den. 49 *U.S.L.W. 3637*

(1981) (motorist's prayer on official state map); *Chambers v. Marsh* 504 *F. Supp.* 585 (D.C. Neb. 1980) (payment of legislative chaplain's salary). Nevertheless, for present purposes we conclude that the practice of the Borough of Metuchen has passed constitutional muster under the Establishment Clause of the First Amendment as interpreted by the United States Supreme Court.

Accordingly, the judgment below is affirmed. No costs.

Chief Justice Wilentz and Justices Sullivan, Schreiber and Pollock join in this opinion.

Justice Pashman has filed a separate concurring opinion.

Justice Clifford has filed a separate concurring opinion in which Justice Pashman joins.

[1]The four invocations are as follows:

[1] Protect and nourish the voice of dissent when it is right, for it may lead to a higher justice. Let us disagree on methods, but let us be united on goals of service to all men.

[2] Let us take the next few moments of silence to each seek in our own way whatever sources of inspiration will help us make those decisions which will be in the best interests of all the citizens of the Borough of Metuchen.

[3] Heavenly Father as always we thank you for many things tonight, especially we thank you for young people, Girl Scouts, Brownies, and above all for Leaders who care and now may we ask that all that we do be for the good of all the people of this community.

[4] Heavenly Father it is most appropriate that in this Country which was founded on the bedrock of religious freedom for all people that we take this opportunity to recognize you and ask for your guidance. First, we thank you for the freedom that we share, in particular, we appreciate our freedom of speech. Second, we ask for your guidance in the decisions that we deliberate on this evening. We all do not share the same opinion on each topic to be considered but we must evaluate the views of others, therefore, we pray for your guidance so that people of Metuchen benefit from our decisions. Third, we ask you to bless those assembled here this evening as well as all the residents of Metuchen.

[2] The New Jersey Constitition is not directly implicated here. Our constitution states that "there shall be no establishment of one religious sect in preference to another." *N.J. Const.* (1947), Art. 1, Para. 4. We have previously held that "our State provision is less pervasive, literally, than the federal provision" which states that "Congress shall make no law respecting an establishment of religion." We have, therefore, generally limited our discussion to the federal provision as interpreted by the United States Supreme Court in situations where under the particular facts no

one religious sect was assertedly preferred over other sects. *Resnick v. E. Brunswick Tp. Bd. of Ed.*, 77 *N.J.* 88, 102-104 (1978). See also, *Clayton v. Kervick*, 56 N.J. 523, 528 (1970), vacated and remanded 403 *U.S.* 945, 91 *S.Ct.* 2274, 29 *L.Ed.*2d 854 (1971), on remand 59 *N.J.* 583 (1971). It is not suggested in this case that the invocations used are denominational and, indeed, the trial court has determined them to be nondenominational. 163 *N.J. Super* at 593-594. Our analysis is therefore predicated upon the federal constitution.

Should this change, however, the municipal body would have to undertake to develop compelling criteria to meet the exacting judicial scrutiny required under the New Jersey Constitution to ensure that no religious sect dominates and that no sect is disfavored. See *Tudor v. Bd. of Ed.*, 14 *N.J.* 31, 41-44 (1953) (Vanderbilt, C.J.) (New Jersey Constitution prohibits any religious preference). Such scrutiny may very well be different from that accorded under the federal constitution. See *State v. Schmid*, 84 *N.J.* 535 (1980) (more exacting scrutiny of infringements of free speech under the state as opposed to the federal constitution); also, *State v. Johnson*, 68 *N.J.* 349 (1975).

We further note that the plain words of the New Jersey constitutional provision invite an equal protection analysis, rather than the traditional establishment analysis employed by the United States Supreme Court. See also *N.J. Const.* (1947), Art. 1, Para. 5 ("no person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in public schools, because of religious principles"). See, generally, P. Kurland, "Of Church and State and the Supreme Court," 29 *U. Chi. Law Rev.* 1, 5 (1961), republished as P. Kurland, *Religion and the Law* (1962) at 1, 17-18, urging that the establishment and free exercise clauses be merged into a unified principle, "akin to the reading of the equal protection clause," thereby avoiding any inconsistencies between them, *viz.*: "religion may not be used as a basis for classification for purposes of governmental action." But see A. Schwartz, "No imposition of Religion: The Establishment Clause Value," 77 *Yale Law Jnl* 692, 694 (1968), noting that a pure equal protection analysis would lead to irresolvable tensions between establishment and free exercise values. We need not in the context of the present case do more than note some of these possibilities.)

[3]Given the ingenuity and variegated forms of governmental conduct that can implicate religious concerns, as reflected in numerous illustrative decisions, it is not here suggested that "excessive entanglement" is not a viable test in certain contexts, as pointed out in the concurring opinion of Justice Pashman. See, *e.g.*, *State v. Celmer*, 80 *N.J.* 405 (1979), overturning *Schaad v. Ocean Grove Camp Meeting Association*, 72 *N.J.* 237 (1977) (a municipal governing body, actually controlled by a church through its trustees, was quintessential entanglement of government with religion and clearly violative of the Establishment Clause). Thus, even

in this case, where direct official action is involved and the only debatable issue is the religious nature or impact of that activity, entanglement as a test is not eliminated. Rather it is derivatively applied when the religious character of such direct official action is determined. This perhaps serves to explain why the Supreme Court decisions involving prayer or religious exercises in public schools undertaken by teachers or school boards rarely discuss or apply separately the "excessive entanglement" standard. *E.g., Engel v. Vitale*, 370 *U.S.* 421, 82 *S.Ct.* 1261, 8 *L.Ed.* 2d 601 (1962) (official prayer in public school program).

[4]This consideration in the context furnished by the record in this case indicates the absence of any issue or strong contention that the challenged municipal practice offends the Free Exercise Clause of the First Amendment.

[5]We would place in this context the preamble to the New Jersey Constitution which contains several such references to a deity. *N.J. Const.* (1947). While these constitutional references do not furnish an independent basis for determining that the practices here in issue satisfy the First Amendment, they provide illustrative support for the constitutional analysis which leads us to conclude that these practices do not violate the Establishment Clause.

CLIFFORD, J., concurring.

Justice Handler's navigation through the treacherous waters of the establishment clause is sufficiently cautious to attract my concurring vote. While I view the question as a close one, on the basis of this record I join in the Court's conclusion that the practice challenged here does not have the primary effect of advancing religion over nonreligion

As I understand that practice, the governing body of the Borough of Metuchen has authorized no more than the solemnification of its proceedings by one of its members, chosen on a rotating basis. The governing body does not —nor could it constitutionally — encourage or require its members to cast that solemnification in religious form or otherwise make it religious in nature. The fact that some members choose a non-sectarian, religious medium of expression should not, without more, be construed as an endorsement of that medium by the governing body. It is specifically because that thought is at the heart of the

Court's opinion that I vote with it.

Moreover, the opinion contains an implicit, if not explicit, warning found on the other side of that coin; should the frequency or intensity of these religious expressions be increased so that the practice of solemnification becomes identified unmistakably as a religious one and governmental endorsement may reasonably be inferred, then the practice will be invalidated.

Justice Pashman joins in this opinion.

PASHMAN, J., concurring.

Because I am concerned that our decision to uphold the Metuchen Borough Council's practice may encourage others to test the tolerance of the Establishment of Religion Clause, I join in the concurring opinion of Justice Clifford underscoring the limitations of our judgment today. At the same time, I also agree with substantially all of the able opinion of Justice Handler for the Court. My concern is with one step in the Court's analysis of this issue. I would not disregard the need to consider the "excessive entanglement" prong of the three-part test in a case such as this.

The Court states, "where the conduct itself is undertaken directly by governmental officials or personnel, the third element of the tripartite test — excessive government entanglement — is effectively embraced by the other standards of the test." I have no objection to this statement in a case where, because of the absence of a secular purpose or because of a primary or principal effect of inhibiting or advancing religion, "government itself can be said to be actually and directly engaged and, obviously, inextricably 'entangled' in religion." Since failure of any one element of the three-part test is a violation of the Establishment Clause, there is no need to evaluate the third element separately when either of the first two has been violated.

I cannot agree, however, that the converse of this proposition is true — that the third element need not be considered, in cases other than those involving "indirect" government conduct, where the first two elements of the test have been satisfied. It was precisely in such situations,

where the activity satisfied the first two parts of the test but doubts as to constitutionality nonetheless remained, that the "excessive entanglement" prong developed.

As the Court notes, the earlier Establishment Clause cases, involving officially sponsored religious exercises, spoke only in terms of the purpose and effect of the government practice. *E.g. Murray v. Curlett*, 374 *U.S.* 203 (1963); *Engel v. Vitale*, 370 *U.S.* 421 (1962); *West Virginia State Bd. of Ed. v. Barnette*, 319 *U.S.* 624 (1943). They established the first two prongs of the modern test. The third element, "excessive entanglement," grew out of the "effect" prong of the test in *Walz v. Tax Commission of City of New York*, 397 *U.S.* 664 (1970). In determining whether New York City could constitutionally exempt church property from its real estate taxes, the Supreme Court said:

> Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result — the effect — is not an excessive government entanglement with religion.
>
> [*Id.* at 674]

In later cases, this inquiry was separated into two distinct elements of the test: (1) whether the primary effect of the government practice is to advance or inhibit religion, and (2) whether the practice entangles government excessively with religion. *Lemon v. Kurtzman*, 403 *U.S.* 602, 612-613 (1971). The test has recently emerged as clearly comprised of the three prongs —purpose, primary effect, and excessive entanglement. *E.g., Committee for Public Education v. Regan*, 444 *U.S.* 646, 653 (1980); *Meek v. Pittinger*, 421 *U.S.* 349, 358 (1975); *Committee for Public Education v. Nyquist*, 413 *U.S.* 756, 773 (1973). Our own cases have evaluated Establishment Clause issues in terms of this three-part test, *State v. Celmer*, 80 N.J. 405 (1979); *Resnick v. East Brunswick Tp. Bd. of Ed.*, 77 N.J. 88 (1978).

Although the "excessive entanglement" prong developed mainly in the context of government aid to religious organizations, there is no reason to limit its application to such cases. It developed because it was needed to prevent

constitutional violations where a government practice had neither a religious purpose nor primary effect but still involved government too closely with religious activity. The same need is present whether the government practice is aid to religious organizations or some other form of official conduct. Thus, the Supreme Court recently stated the test in full, with all three prongs, when considering a case challenging a government practice which was itself religious. See *Stone v. Graham*, 66 *L.Ed.*2d 199 (1980) (posting of Ten Commandments in public schools).

By dividing Establishment Clause cases into two categories, depending on whether government itself is or is not "directly engaged in a religious activity," the Court adds a new step to the constitutional test. To determine whether a particular government practice violates the Establishment Clause, henceforth a court must first determine whether "the conduct itself is undertaken directly by governmental officials or personnel." If it is, the court will apply only the first two prongs of the test — purpose and effect. If it is not, the court will also apply the third prong — excessive entanglement. Thus, the majority has transformed the well-established and simpler three-prong test, recently reaffirmed in *Stone v. Graham, supra* to a new test consisting of an initial categorization step followed by a two-prong test in some cases and a three-prong test in others. This complication is totally unnecessary. I believe it is more advisable simply to apply the same three-prong test to all Establishment Clause cases.

The "excessive entanglement" prong of the test would serve well in restricting the Metuchen Council and other government entities from overstepping the permissible bounds of these potentially religious practices. Both the majority opinion and the opinion of Justice Clifford caution against any increase in the "frequency or intensity of these religious expressions." I would add that if the Metuchen Council were to get involved in selecting particular clergymen to deliver its opening invocations or selecting particular forms of expression, so that it had to evaluate the merits of competing religions, it might be guilty of "excessive entanglement" although the purpose and primary effect of the

practice are still secular. The fact that an official activity offends neither of these two latter standards does not mean that "in a constitutional sense religion would not be at all involved."

In this case, the Council members are not involved as an official body in selecting the form or content of the invocations. Each member takes a turn to present his own personally selected expressions. Also, the Council does not choose among local clergymen to present the opening invocations. Nor has the plaintiff shown any other way in which the government is "excessively entangled" in making religious decisions. Accordingly, I would find that the Metuchen Council's present practice does not foster "excessive entanglement" of government with religion. In another case, where the facts are slightly different, the government practice might not survive scrutiny under the Establishment Clause.

I would retain the "excessive entanglement" prong of the test in all cases to aid in judicial evaluation of the government practices which might encroach upon the Establishment Clause although otherwise embracing a purpose and primary effect that are secular.

CERTIFICATE OF SERVICE

I, Robert A. Vort, counsel for Paul Marsa, hereby certify that on the 4th day of September, 1981, I served copies of the foregoing Appeal and/or Application for Writ of Certiorari on the appellees, the intervenor Knights of Columbus, the Solicitor General of the United States and the United States Department of Justice, Civil Division, by mailing three copies to each in a duly addressed envelope, with postage prepaid, to:

Martin A. Spritzer, for the appellees,
414 Main Street
Metuchen, N.J. 08840

Thomas W. Sharlow, for the intervenor,
10 Station Pl.
Metuchen, N.J. 08840

The Solicitor General
Department of Justice
Washington, D.C. 20025

U.S. Department of Justice
Civil Division
10th and Constitution Avenue
Washington, D.C. 20530

Robert A. Vort

Robert A. Vort
Counsel for Appellant

Ste 2505
1180 Raymond Boulevard
Newark, N.J. 07102
(201) 643-2022

Motion to Dismiss or Affirm

FILED
OCT 5 1981
ALEXANDER L. STEVAS
CLERK

No. 81-441

Supreme Court of the United States

OCTOBER TERM, 1980

PAUL MARSA,

Appellant,

vs.

DONALD J. WERNIK, individually and as the Mayor of the Borough of Metuchen, DONALD J. BARNICKEL, JOHN W. BERTRAND, PATRICIA LAGAY, DENNIS O'LEARY, THOMAS E. SHARP, and JOHN WILEY, JR., individually and as members of the Council of the Borough of Metuchen,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES TO DISMISS

MARTIN A. SPRITZER,
Attorney for Appellees,
414 Main Street,
Metuchen, New Jersey 08840.
(201) 548-6455

DENNIS J. CONKLIN,
414 Main Street,
Metuchen, New Jersey 08840,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
MOTION TO DISMISS	1
ARGUMENT:	
I. The within appeal does not conform to the jurisdictional requirements of 28 U.S.C. §1257 and should be dismissed	2
II. The instant appeal, treated as a petition for certiorari, does not present issues meriting review for "special and important reasons", and a writ of certiorari should be denied	5
CONCLUSION	7

Cases Cited

Bogen v. Doty, 456 F.Supp. 983 (D.Minn. 1978) *aff'd.*, 598 F.2d 1110 (8th Cir. 1979) 6

Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed. 2d 948 (1973) 6

DeBacker v. Brainard, 396 U.S. 28, 24 L.Ed. 2d 148, 90 S.Ct. 163 (1969) 4

Grossberg v. Deusebio, 380 F.Supp. 285 (E.D. Va. 1974) 7

King Mfg. Co. v. City Council of Augusta, 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed. 801 (1928) 3

Lathrop v. Donohue, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed. 2d 1191 (1961) 3-5

Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971), reh. den. 404 U.S. 876, 92 S.Ct. 24, 30 L.Ed. 2d 123 (1971) 6

PAGE

Lincoln v. Page, 109 N.H. 30, 241 A.2d 799 (1968) 6

Marsa v. Wernik, 86 N.J. 232, 430 A.2d 888 (1981) 3

Marsa v. Wernik, 163 N.J. Super. 589, 395 A.2d 530 (Ch. Div. 1978) 2

Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217, reh. den. 422 U.S. 1049, 95 S.Ct. 2668, 45 L.Ed. 2d 702 (1975) 6

Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed. 2d 697 (1970) 6

Wiest v. Mt. Lebanon School District, Pa., 320 A.2d 362 (1974) 7

Wood v. Mt. Lebanon Township School District, 342 F.Supp. 1293 (W.D. Pa. 1972) 7

Statutes Cited

28 U.S.C.:

§1257 2

§1257(2) 2-5

§2103 5

Rules Cited

U.S. Sup. Ct. Rules, 28 U.S.C.:

16.1(a) 1

17 5

No. 81-441

Supreme Court of the United States

OCTOBER TERM, 1980

PAUL MARSA,

Appellant,

vs.

DONALD J. WERNIK, individually and as the Mayor of the Borough of Metuchen, DONALD J. BARNICKEL, JOHN W. BERTRAND, PATRICIA LAGAY, DENNIS O'LEARY, THOMAS E. SHARP, and JOHN WILEY, JR., individually and as members of the Council of the Borough of Metuchen,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES TO DISMISS

The appellees respectfully move to dismiss the appeal herein pursuant to U.S. Sup. Ct. Rule 16.1(a), 28 U.S.C.A. on the ground that the within appeal is not within this Court's jurisdiction or in conformity with statute.

ARGUMENT

I. The within appeal does not conform to the jurisdictional requirements of 28 U.S.C. §1257 and should be dismissed.

Appellant invokes the appellate jurisdiction of this Court pursuant to 28 U.S.C. §1257(2). In its pertinent part, this statute provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision can be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where there is drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellant alleges in his Jurisdictional Statement that the conduct of the Metuchen Borough Council, appellees herein, constitutes or is pursuant to a "statute" within the meaning of this legislation. The factual basis underlying this appeal was described in the opinion of the trial court below, *Marsa* v. *Wernik*, 163 N.J. Super. 589, 395 A.2d 530, 531 (Ch.Div. 1978):

> On motion and cross-motion for summary judgment the facts are undisputed. *The council practice, which is not formalized in any ordinance, resolution, or rule of procedure,* is as follows. The mayor asks those who wish on the council and in the audience to rise for an invocation or silent meditation. The individual members, on a rotating basis, give a short invocation or silent meditation. The salute to the flag follows. (Emphasis added).

The Supreme Court of New Jersey similarly describes the practice in its opinion, *Marsa* v. *Wernik*, 86 N.J. 232, 430 A.2d 888 (1981), and adds,

> It appears that the member who gives the invocation has himself determined or selected its contents. There is nothing to suggest that it is in any way subject to the approval of any other official or person. (430 A.2d at 891).
>
> • • •
>
> While the opening exercise is conducted by individual council members and to that extent is under an official aegis, it does not purport to be otherwise officially sponsored or authorized; rather each opening exercise can be viewed as the beliefs or sentiments of the individual in his private capacity. (430 A.2d at 899).

The question presented is whether the practice of the Mayor and council members of the Borough of Metuchen, lacking statutory or indeed any formal authorization as to its existence or content, fits the definition of a "statute of any state" within the meaning of 28 U.S.C. §1257(2). The scope of this definition has been treated at length in the opinions of this Court, *e.g.*, *Lathrop* v. *Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961), and *King Mfg. Co.* v. *City Council of Augusta*, 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed.2d 801 (1928), and has been held to embrace municipal ordinances, *King Mfg. Co.* v. *City Council of Augusta, supra.* In *Lathrop* v. *Donohue, supra,* this Court distilled from among its previous decisions the characteristics essential to the term "statute" for the purposes of 28 U.S.C. §1257(2), quoting from *King Mfg. Co.* v. *City Council of Augusta, supra*:

> [T]he jurisdictional provision uses the words 'a statute of any state' in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include *every act legislative in character to which the State gives its sanction.* (367 U.S. at 824, 6 L.Ed.2d at 1195) (Emphasis added).

While it is broad in its scope, the definition does have its limits, and does not embrace every exertion of state power. Thus, this Court, in *DeBacker* v. *Brainard,* 396 U.S. 28, 24 L.Ed.2d 148, 90 S.Ct. 163 (1969) found no "statute" within the meaning of 28 U.S.C. §1257(2) to be involved where the practice complained of—the prosecutor's discretion to try an offense in juvenile or adult court—had its basis in the case law of the state, rather than in any explicit statutory provision.

In the instant case, there is no statutory provision, either of the state legislature, or by any enactment of the Borough Council itself, underlying the conduct here complained of. There is no formal authorization whatsoever, by ordinance, by-law, resolution, rule or other formal means. Recognizing this, the appellant argues that the Metuchen Council's practice constitutes a "statute" simply because it occurs during meetings which the Council is bound to hold in virtue of state statute. It may be assumed that the prosecutor's office and function treated with in *DeBacker* v. *Brainard, supra,* were also established pursuant to state legislation. However, it was not suggested in that case that because of this, the specific conduct of the prosecutor there at issue was legislatively derived within the meaning of 28 U.S.C. §1257(2).

Even assuming *arguendo* the practice of the Metuchen Borough Council to be, *ipso facto,* an "act legislative in character", *Lathrop* v. *Donohue, supra,* it is clearly not an act "to which the State gives its sanction", *Id.* With respect to this, the absence of any formal enactment underlying the practice at issue is of more than merely technical importance. Albeit the moments of meditation or invocation at council meetings are had at the invitation of the Mayor, yet this is done as a matter of custom only, and there is no right or obligation to do so. There is no rule of procedure, by-law, resolution, ordinance, or statute upon which any person may rely in insisting, before any tribunal, that the procedure be carried out. Thus, unless the concept of "sanction" be overextended to embrace anything that the legislature, by its *in*action, suffers to be done, there is before this Court no "act . . . to which the State gives its sanction". Accordingly, there is before this Court no "statute of any state" within the meaning of 28 U.S.C. §1257(2), and the instant appeal should be dismissed.

II. The instant appeal, treated as a petition for certiorari, does not present issues meriting review for "special and important reasons", and a writ of certiorari should be denied.

Appellant alternatively invokes the jurisdiction of this Court on writ of certiorari, pursuant to 28 U.S.C. §2103. With respect to considerations governing review on a writ of certiorari, U.S. Sup. Ct. Rule 17, 28 U.S.C.A. provides,

> .1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor.

Regarding decisions of state courts of last resort, the Rule provides for review as follows:

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

None of the foregoing reasons is apparent in the instant matter. The Supreme Court of New Jersey's decision in the present case is in accord with all other reported decisions treating with invocations at meetings of governing bodies, *Bogen* v. *Doty*, 456 F.Supp. 983 (D.Minn. 1978) *aff'd.*, 598 F.2d 1110 (8th Cir. 1979), and *Lincoln* v. *Page*, 109 N.H. 30, 241 A.2d 799 (1968). Moreover, these decisions are founded upon the guidelines previously set forth in the decisions of this Court which developed the well-known "tripartite" test to be applied to practices challenged under the Establishment Clause of the First Amendment, *e.g.*, *Meek* v. *Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), reh. den. 422 U.S. 1049, 95 S.Ct. 2668, 45 L.Ed.2d 702 (1975); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed. 2d 948 (1973); *Lemon* v. *Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), reh. den. 404 U.S. 876, 92 S.Ct. 24, 30 L.Ed.2d 123 (1971); *Walz* v. *Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

In addition to that of the municipal council cases *ante*, the harmony of results achieved in similar cases upholding the constitutionality of religious invocations at public school graduation ceremonies strongly supports the view

that the guidelines established by this Court in Establishment Clause cases are viable and do not require such further explication by this Court as to justify review of the instant matter on certiorari. See, *e.g., Grossberg* v. *Deusebio,* 380 F.Supp. 285 (E.D. Va. 1974); *Wood* v. *Mt. Lebanon Township School District,* 342 F.Supp. 1293 (W.D. Pa. 1972); *Wiest* v. *Mt. Lebanon School District, Pa.,* 320 A.2d 362 (1974).

Beyond his proffer that the decisions mentioned were incorrect, the sole important reason appellant gives for review on certiorari is the need of municipal attorneys for this Court's guidance. Like attorneys with other specialties, municipal attorneys throughout the nation undoubtedly look forward to the guidance provided them in their practices by the opinions of this Court. But where such cannot be had they must, and do, have recourse to the opinions of the lower courts. As a solution to the quandary proposed by the appellant, the appellees respectfully suggest that municipal attorneys who are called upon to advise their clients in the matter of religious invocations can do no wrong if they base their advice on the most conservative opinion treating directly with the issue, to wit, the opinion of the Supreme Court of New Jersey in the instant case.

CONCLUSION

For the foregoing reasons, the appellees respectfully request that the appeal be dismissed; alternatively, it is respectfully requested that a writ of certiorari be denied.

Respectfully submitted,

MARTIN A. SPRITZER,
Attorney for Appellees.